IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE TWENTY SECOND DAY OF SEPTEMBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE BILAL NAZKI

and
THE HON'BLE MR JUSTICE S.ANANDA REDDY

WRIT PETITION NO : 15312 of 2003 AND W.P.NO. 3051 OF 2004

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W.P.NO. 15312 OF 2003

Between:

M/s. Surana Telecom Ltd, A Public Ltd, Company incorporated under the provisions of the companies Act 1956, having its Regd.Office at 2nd floor, Surya Towers, Sec'bad,rep.by its M.D., Narender Surana S/o.G.M.Surana, aged about 43 years

..... PETITIONER

AND

1 Government of India, Department of Revenue Ministry of Finance & Company Affairs North Block, New Delhi, represented by its Secretary
2 The Deputy Commissioner (Customs) Air Cargo Complex, Begumpet,Hyderabad
3 Government of India, Ministry of Communications and IT Department of Telecom, Sanchar Bhavan, 20-Ashoka Road, New Delhi, represented by its Director (IP)

.....RESPONDENT(S)

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or direction especially in the nature of Writ of Mandamus declaring the Circular No. 57 of 2003 dated 27-6-2003 issued by the Government of India, Ministry of Finance and Company Affairs, Department of Revenue (Tariff Unit), the

first respondent, is arbitrary, irrational, illegal and void, and declare that the Fixed Wireless Telephones are eligible for benefit under Notification No. 21 of 2002 Customs dated 1-3-2002 as Cellular Phones at Sl.No. 313 thereof

Counsel for the Petitioner: MR.S.RAVI

Counsel for the Respondents: Standing Counsel for Central Government.

WRIT PETITION NO : 3051 of 2004

Between:

M/S.Bhagyanagar Metals Ltd., A Public Ltd.Company, incorporated under the provisions of companies Act, 1956, Having its office at 2nd floor, Surya Towers,Secunderabad.

..... PETITIONER

AND

1 Govt.of India, Dept.of Revenue, Ministry of Finance & Company Affairs, North Block, New Delhi, rep. By its Secretary.
2 The Deputy Commissioner (Customs), Air Cargo Complex, Begumpet,Hyderabad.
3 Govt.of India, Ministry of Communications and IT Dept., of Telecom, Sanchar Bhavan, 20-Ashoka Road, New Delhi, rep. By its Director.

.....RESPONDENT(S)

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a writ, order or direction especially one in the nature of writ of Mandamus declaring the circular No.57 of 2003 dated 27-06-2003 issued by the Govt. of India, Ministry of Finance and Company Affairs, department of Revenue (Tariff Unit), the First Respondent, as arbitrary, irrational, illegal and void, and declare that fixed wireless Telephones are eligible for benefit under notification No.21 of 2002 customs dated 01-03-2002 as cellular phones at Sl.No.313 thereof and pass.

Counsel for the Petitioner: MR.S.RAVI

Counsel for the Respondents : Standing Counsel for Central Government

The Court made the following :

HON'BLE MR. JUSTICE BILAL NAZKI

AND

HON'BLE MR. JUSTICE S. ANANDA REDDY

W.P.NO. 15312 OF 2003 AND W.P.NO. 3051 OF 2004

COMMON ORDER: (Per Hon'ble Mr. Justice Bilal Nazki)

Heard learned counsel for the parties. Circular No. 57 of 2003, dated 27.6.2003 issued by the 1st respondent is challenged in these writ petitions.

The petitioners are dealing with the fixed wireless telephones and fixed wireless terminals working on cellular technology which are classified in entry No. 8525.20.17 of the schedule to Customs Tariff Act and are exigible to duty at 15%. However, in terms of the exemption notification No. 21/2002 the telephones of this type are exigible to duty at 5%. The entry reads as 'cellular phones and radio trunking terminals'. It is submitted by the learned counsel for the petitioners that the phones with which the petitioners are dealing are cellular and wireless phones, but the shape of the phone is not of same type of which the mobile phones are available which are commonly known as mobile or cellular phones. The instruments with which the petitioners are dealing are similar to the instruments which are used as land phones, but, as a matter of fact, they are neither connected to any wire nor to any exchange and are mobile and wireless phones and the technology with which they are manufactured is same by which cellular phones are manufactured. These contentions have not been disputed even in the counter-affidavit. It is stated in the counter-affidavit that the difference between the phones is that one is held by hand, whereas the phones with which the petitioners are dealing are fixed wireless telephones, but are working on cellular technology. In the impugned circular issued by the 1st respondent it has categorically been stated in para-4,

> "The technology used could either be GSM (Global System for Mobile Communication) used by Airtel, Hutch etc. or FDMA (Frequency Division Multiple Access), or CDMA (Code Division Multiple Access) being used by WLL-Reliance & WLL-Tata. The application of cellular technology for providing basic telephone services through Fixed Wireless Telephones & Fixed Wireless Terminals is a recent development. The term "cellular phone" traditionally and commercially refers to hand held mobile phones only."

If this circular is applied by the authorities who are supposed to make assessments under the Customs Act, there is no discretion left with those authorities to decide whether a particular phone was a

cellular phone or not. In our view, the 1st respondent has no such power to issue such directions which were to decide quasi judicial matters between the parties. Section 157 of the Customs Act lays down the powers to make regulations. No power under Section 157 of the Customs Act is available to the 1st respondent to make an order of the nature of the impugned circular. Since the whole mechanism of assessment, appeals and revisions is provided under the Act and it is expected that an authority who makes an assessment will make the assessment on the basis of law and on the basis of facts of a particular matter. In this view of the matter, we feel that the circular is an interference with the statutory powers of the authorities who are supposed to make assessment, hear appeals and revisions. Such interference cannot be allowed as far as authorities discharging quasi-judicial functions. We are fortified in our view by the earlier judgment of a Division Bench of this Court reported in *B. Arunkumar Trading Private Limited & others Vs. Commercial Tax Officer, Kurupam Market, Visakhapatnam & 2 others etc.* .

Therefore, we allow the writ petitions, quash the impugned circular and leave it open for the authorities concerned to appreciate the matter on the basis of settled principles of law and make assessments accordingly.

The learned counsel for the petitioners submits that the petitioners had given a bank guarantee on the orders of this Court. Since there is no assessment made so far, therefore there is no question of the respondents retaining the bank guarantee. The question of payment of liability would only arise when an assessment is made. Therefore the respondents are directed not to encash the bank guarantee and return it to the petitioners immediately. No costs.

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BN J.

SAR J.

Dt.22.9.2004

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That the rule nisi is made absolute as above.

Witness the Hon'ble Sri Devinder Gupta, Chief Justice on this the Wednesday, 22nd day of September, 2004

Sd/-

ASST. REGISTRAR

//True Copy//

Section Officer

To

1 Government of India, Department of Revenue Ministry of Finance & Company Affairs North Block, New Delhi, represented by its Secretary
2 The Deputy Commissioner (Customs) Air Cargo Complex, Begumpet,Hyderabad
3 Government of India, Ministry of Communications and IT Department of Telecom, Sanchar Bhavan, 20-Ashoka Road, New Delhi,

represented by its Director (IP)

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